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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO DIONISIO, Witness Before the Special February 1971 Grand Jury

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Respondent, Antonio Dionisio, hereby files his memorandum in opposition to a petition for writ of certiorari.

OPINION BELOW

The opinion of the Court of Appeals is reported at 442 F.2d 276 (Petition for Certiorari App. A, pp. 12-19).

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1971. On June 14, 1971 the Court of Appeals denied a petition for rehearing with suggestion for rehear-

ing en banc (Petition for Certiorari App. B, pp. 20-21). On July 8, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). On December 14, 1971 the Court requested Respondent to file a response to the petition for certiorari on or before January 13, 1972. The time for filing the response to the petition for certiorari was subsequently extended to February 14, 1972.

QUESTION PRESENTED

Does the Fourth Amendment bar the compelling of a grand jury witness to furnish a voice exemplar for comparison with exhibits consisting of recordings of lawfully intercepted wire communications where approximately twenty (20) persons have been subpoenaed to provide exemplars, absent a showing of reasonableness of the request to provide exemplars.

STATEMENT

The Special February 1971 Grand Jury in the Northern District of Illinois is allegedly investigating illegal gambling. It has allegedly received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. (Supp. V) 2518, authorizing interception of wire communications. There has been no determination of the validity of the orders of the interceptions.

The grand jury subpoenaed approximately twenty (20) persons, including respondent Dionisio, and sought to obtain from him voice exemplars for identification purposes. The witness was informed that he was a potential defendant in a matter being investigated by the grand jury. He was asked to examine a transcript of a recording of an authorized intercepted communication and to go to a near-

by room and read the transcript into a telephone connected to a recording device. Dionisio refused to give a voice exemplar, asserting rights under both the Fourth and Fifth Amendments. (Petition for Certiorari App. A, pp. 12-13).

A petition was then filed in the district court seeking orders directing respondent to furnish a voice exemplar for comparison with the recordings. Following a hearing, the district court ordered him to furnish the exemplars. The respondent subsequently refused to do so. The district court adjudged him guilty of civil contempt, and committed him to prison until he obeyed its order or the grand jury term expired (Petition for Certiorari App. D, p. 25).

The Court of Appeals reversed (Petition for Certiorari App. A). It rejected the claim that the grand jury's request for the voice exemplars violated respondent's rights under the Fifth and Sixth Amendments, but concluded that to compel compliance with the request would violate his Fourth Amendment rights. In the Court's view, the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars" (Petition for Certiorari App. A, p. 17). The Court held that if the Fourth Amendment applied to grand jury proceedings *Hale* v. *Henkel*, 201 U.S. 43 (1906) and that this "seizure" of physical evidence contradicted the "standard of reasonableness" required by the Fourth Amendment, as recently construed in *Davis* v. *Mississippi*, 394 U.S. 721. Equating the grand jury's procedure to the police arrests involved in *Davis*, the Court concluded that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*" (id. at p. 19).

ARGUMENT

The position advanced by the petitioner would limit *Hale* v. *Henkel,* 201 U.S. 43 (1906) solely to a determination of reasonableness in a subpoena requiring the production of documentary evidence and would abrogate the effect of the Fourth Amendment to all other seizures. We respectfully submit that Dionisio *does not* establish a blanket rule that all grand jury subpoenaes requiring the production of voice exemplars are subject to motions to quash based upon a lack of showing of reasonableness but limits its effect to those attempts to compel a citizen to furnish such exemplars when there has been no such showing of reasonableness. As has been said many times, each case must rest upon its own special facts. It is apparent in this case, absent a showing to the contrary, that the grand jury was engaged in a "fishing expedition" which had a "dragnet effect" since they subpoenaed twenty persons to give voice exemplars, including the respondent. There is no showing as to why the respondent was included in this large group of persons. Although it is clear from the record that no probable cause existed to arrest the respondent so that other attempts could be made to compel a voice exemplar rather than under the alleged aegis of a grand jury subpoena.

We respectfully submit that the principles of the *Davis* v. *Mississippi,* 394 U.S. 725 apply with equal force to a subpoena, such as that presented in the instant case.

If the opinion of the Court of Appeals in this case is not valid all that would be needed to be done to avoid the principles enunciated in *Davis* by any law enforcement agency would be to subpoena all possible subjects before

a grand jury and compel each of them to provide appropriate exemplars. The basis for the issuance of the subpoena could be as frivolous as any basis which could be imagined by a law enforcement officer and the law enforcement agencies would thereby be able to obtain indirectly what *Davis* prohibits directly. The harassment would be as oppressive and violative of personal rights as the action of police acting without grand jury authority condemned in *Davis*.

Grand juries have two basic, if not contrary, functions. A prime function is to investigate possible offenses, *United States* v. *Johnson*, 319 U.S. 503, on the other hand it stands between the accuser and the accused. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Hannah* v. *Larche*, 363 U.S. 420, 499 (Douglas, J. dissenting).

The decision here sought to be reviewed merely prohibits the prostitution of a grand jury so it becomes a mere tool of investigative authorities. It does not declare a new constitutional principle, deserving review by this Court, but merely reaffirms and follows what have been the teachings of this Court for over half a century. *Hale* v. *Henkel*, 201 U.S. 43 (1906)

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted

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Attorney for Respondent